



# STATE OF INDIANA

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November 9, 2012

Ms. Denise Giddens  
3220 Highwoods Court  
Indianapolis, Indiana 46222

*Re: Formal Complaint 12-FC-321; Alleged Violation of the Access to Public Records Act by the Family and Social Services Administration*

Dear Ms. Giddens:

This advisory opinion is in response to your formal complaint alleging the Family and Social Services Administration ("FSSA") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Kevin Wild, Attorney, responded on behalf of the FSSA. His response is enclosed for your reference.

## BACKGROUND

In your formal complaint, you allege that on August 29, 2012, you submitted a written request for records to the FSSA. You provide that the FSSA timely acknowledged the receipt of your request in writing within 24 hours. On October 12, 2012, Mr. Wild informed you that the request was currently being assembled. As of October 26, 2012, the date you filed your formal complaint with the Public Access Counselor's Office, you further allege that the FSSA has yet to produce any records that were responsive to your request.

In response to your formal complaint, Mr. Wild acknowledged that as of October 30, 2012, the date Mr. Wild received your formal complaint, the FSSA had yet to produce any of the requested records and that you were informed on October 12, 2012, that the request was being assembled. Mr. Wild stated that based on the content and timing of your request, it appears that you had effectively submitted a discovery request for your appeal before the State Employees Appeals Commission ("Commission"). Mr. Wild is representing the FSSA in the appeal before the Commission and settlement discussions have been taking place over the course of the last several weeks.

Certain parts of your request were denied because the request failed to identify with reasonable particularity the records that were being sought pursuant to I.C. § 5-14-3-3(a). All other records were provided on October 31, 2012. As to the timeliness of the response, Mr. Wild advised that collecting all records that were responsive to your

request required the assistance of others within the agency. As of October 12, 2012, there were only two records remaining that had yet to have been provided to Mr. Wild. On October 12, 2012, October 15, 2012, October 26, 2012, and October 30, 2012, Mr. Wild attempted to retrieve the records from those within the FSSA. On October 31, 2012, the records were finally provided to Mr. Wild, at which point you were immediately given a copy.

## ANALYSIS

The public policy of the APRA states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” *See* I.C. § 5-14-3-1. The FSSA is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the FSSA’s public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). A response from the public agency could be an acknowledgement that the request has been received and include information regarding how or when the agency intends to comply. Here, the FSSA responded to your written request, in writing, within 24 hours of its receipt. As such, it is my opinion that the FSSA complied with the requirements of section 9(b) of the APRA in response to your request.

The APRA requires that a records request “identify with reasonable particularity the record being requested.” I.C. § 5-14-3-3(a)(1). “Reasonable particularity” is not defined in the APRA, but the public access counselor has repeatedly opined that “when a public agency cannot ascertain what records a requester is seeking, the request likely has not been made with reasonable particularity.” *See Opinions of the Public Access Counselor 10-FC-57; 08-FC-176*. However, because the public policy of the APRA favors disclosure and the burden of proof for nondisclosure is placed on the public agency, if an agency needs clarification of a request, the agency should contact the requester for more information rather than simply denying the request. *See generally* IC 5-14-3-1; *Opinions of the Public Access Counselor 02-FC-13; 05-FC-87; 11-FC-88; 12-FC-279*. Although I would agree with the FSSA that certain parts of your request failed to identify the records sought with reasonable particularity, the FSSA acted contrary to the APRA by denying your request based on this failure.

Effective July 1, 2012, the APRA provides a public agency shall provide records that are responsive to the request within a reasonable time. *See* I.C. § 5-14-3-3(b). The public access counselor has stated that factors to be considered to be considered in determining if the requirements of section 3(a) under the APRA have been met include,

the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and edited to delete nondisclosable material is necessary to determine whether the agency has produced records within a reasonable timeframe. The APRA requires an agency to separate and/or redact confidential information in public records before making the disclosable information available for inspection and copying. *See* I.C. § 5-14-3-6(a). Section 7 of the APRA requires a public agency to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. *See* I.C. § 5-14-3-7(a). However, Section 7 does not operate to deny to any person the rights secured by Section 3 of the Access to Public Records Act. *See* I.C. § 5-14-3-7(c). The ultimate burden lies with the public agency to show the time period for producing documents is reasonable. *See Opinion of the Public Access Counselor 02-FC-45*. This office has often suggested a public agency make portions of a response available from time to time when a large number of documents are being reviewed for disclosure. *See Opinions of the Public Access Counselor 06-FC-184; 08-FC-56; 11-FC-172*. Further nothing in the APRA indicates that a public agency's failure to provide "instant access" to the requested records constitutes a denial of access. *See Opinions of the Public Access Counselor 09-FC-192 and 10-FC-121*.

Your original request for records was received by the FSSA on August 29, 2012, to which it responded in writing within 24 hours. The FSSA provided all records responsive to the reasonably particular portions of your request on October 31, 2012. In addition to handling your request made under the APRA, Mr. Wild has advised that he was also representing the FSSA before the Commission regarding the appeal that you had filed and settlement discussions were ongoing. During the pendency of your request and settlement discussions, you have provided email correspondence between yourself and Mr. Wild regarding both issues, which demonstrate that Mr. Wild was attentive to your inquiries. In addition, Mr. Wild advised you that he recently been out of the office more frequently during the process of assembling and reviewing all records that were responsive to your request. As the FSSA on October 31, 2012 provided all records that were responsive to the reasonable particular portions of your request, the FSSA's compliance with section 9(b) of the APRA, Mr. Wild's responsiveness to your written inquiries, and the FSSA's ongoing responsibility to maintain the normal duties and functions of the agency, it is my opinion that the FSSA complied with the requirements of section 3(b) of the APRA by providing all records that were responsive to the particularized portions of your request within a reasonable period of time.

## CONCLUSION

For the foregoing reasons, it is my opinion the FSSA complied with the requirements of section 9(b) of the APRA by acknowledging the receipt of your request in writing within 24 hours. It is my opinion that that FSSA acted contrary to the APRA by denying your request due to the request failed to identify certain records with reasonable particularity. Lastly, it is my opinion that the FSSA complied with the requirements of section 3(b) of the APRA by providing all records that were responsive to the particularized portions of your request in a reasonable period of time.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a distinct "Hoage" following.

Joseph B. Hoage  
Public Access Counselor

cc: Kevin Wild.